Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

LOUDOUN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Whether a school district has an obligation under IDEA to offer educational services to a disabled student once the student moves to another jurisdiction and receives a free appropriate public education there.

2. Whether a student's move to another jurisdiction moots the issue of the appropriateness of the student's IEP which was proposed prior to his relocation.

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No.

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MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross-Petitioner, Loudoun County Board of Education, respectfully requests that this Court grant this Conditional Cross-Petition in the event it grants the Petition

for Writ of Certiorari submitted by the Respondents in this case.

OPINIONS BELOW

The Opinion and Order of the court of appeals reversing the district court and remanding the case for dismissal is reported at 118 F.3d 996 (4th Cir. 1997) A-1.[1] The Order (A-18), the Memorandum Opinion (A-20) and the Supplemental Opinion (A-39) of the district court are not officially reported. However the Memorandum Opinion of the district court is unofficially reported at 24 Individuals with Disabilities Education Law Report (IDELR) 1171. The state administrative decision (A-41) is unofficially reported at 22 IDELR 833. The decision of the administrative due process hearing (A-47) is unofficially reported at 21 IDELR 1089. Additional decisions relevant to this cross-petition include the decision of the district court denying the Motion to Dismiss dated March 1, 1996, which is not a reported decision. CA-1.[2]

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[1] References to the Appendix in the Petition filed by the Hartmanns will be designated "A" followed by the page number; thusly "A-1."

[2] References to the Appendix set forth in the cross-petition will be designated as "CA" followed by a page number.

JURISDICTION

The Order of the Court of Appeals was entered on July 8, 1997. The petition of the Hartmanns was filed with this court on October 1, 1997 and placed on the docket on October 3, 1997. The brief in opposition was originally due on November 2, 1997, a Sunday. November 3, 1997 is the next day not a weekend or holiday. This Conditional Cross-Petition is filed in express reliance on Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1414.[3] Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall --

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[3] The citations to the Individuals with Disabilities Education Act are to the version in effect during the course of these proceedings and not to the reauthorized version of IDEA which became effective June 4, 1997.

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which --

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

.....

20 U.S.C. § 1415. Procedural Safeguards

(b)(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

.....

(e) Civil action; jurisdiction

.....

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. § 300.220. Child identification.

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

8 VAC 20-80-50. Identification, evaluation, and eligibility.

A. Target ages and eligibility. Each annual special education plan/report and funding application shall include procedures which ensure that all children residing within the jurisdiction of an LEA, birth to age 21, inclusive, who may have disabilities, and who may need special education and related services are identified, located and evaluated. The plan also shall include a practical method for determining children who are receiving needed special education and related services and those who are not receiving such services.

.....

C. Screening.

1. Each local school division shall establish and maintain screening procedures to assure the identification of children with disabilities residing within its jurisdiction and requiring special education. All procedural safeguards shall be maintained during the screening process. These include the following:

a. Written notice when appropriate;

b. Confidentiality; and

c. Maintenance of student's scholastic record.

.....

8 VAC 20-80-60. Service delivery.

A. Free appropriate public education.

1. Age of eligibility. A free appropriate public education shall be available to all children with disabilities, ages two to 21, inclusive, residing within the jurisdiction of each LEA. Each LEA shall have established the goal of providing a full educational opportunity for all children with disabilities from birth to 21, inclusive, residing within their jurisdiction.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Fourth Circuit, on July 8, 1997, ruled in favor of the Loudoun County Board of Education ("Loudoun"), reinstated the decisions of the administrative hearing officers and reversed the district court's decision of November 27, 1997, as being contrary to the law. That decision denied one ground for reversal raised by Loudoun, namely that the case was moot due to Mark Hartmann's ("Mark") move from Loudoun County, which denial is the subject of this conditional cross-petition.

This case originated with administrative proceedings brought under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") at the request of Loudoun on June 24, 1994. Loudoun requested a due process hearing to gain permission to implement an individualized education plan ("IEP") developed on May 31, 1994, for an autistic student named Mark Hartmann. A-5. The proposed

IEP provided for a combined placement in regular education and special education classes at a regular elementary school. Id. Mark's parents refused to give consent for his academic instruction to take place in a special education classroom. Id.

Five days of administrative hearings, which included the testimony of eighteen witnesses, were held from August 15, 1994 through October 27, 1994, under 20 U.S.C. § 1415(b)(2). The local hearing officer ruled on December 21, 1994, that Loudoun's proposed IEP offered Mark a free appropriate public education and ordered its implementation. A-47. Immediately following this decision, Mrs. Hartmann moved with Mark to Montgomery County, Virginia, and enrolled him in the public school system there. A-6. The Hartmanns have sought no educational services for Mark from Loudoun since that time. CA-7. His education has been provided free of charge in Montgomery County, Virginia. Id. The last IEP proposed for Mark by Loudoun was the May 31, 1994 IEP developed prior to Mark's removal. All subsequent IEPs have been developed and implemented by the Montgomery County Public Schools. Id.

The Hartmanns appealed the adverse decision of the local hearing officer to the state level. The state review officer on May 3, 1995, affirmed the decision of the local hearing officer, again finding that Loudoun's proposed IEP was appropriate. A-6. The state review officer declined, however, on May 31, 1994, to find that the move of Mark to Montgomery County ended the obligation of Loudoun to provide services to Mark. A-42 .

The Hartmanns filed an appeal to federal district court pursuant to 20 U.S.C. § 1415(e)(3) on December 6, 1995. The district court granted a motion to dismiss Dr. Edgar B Hatrick, Superintendent, and Ned Waterhouse, Director of Pupil Personnel Services as defendants.[4] CA-1. The district court denied Loudoun's motion to dismiss the case as moot due to Mark's relocation to Montgomery County, Virginia. Id.

The district court received some additional evidence on September 8 and 9, 1996. Loudoun objected to the additional evidence relating to Mark's program after his move from Loudoun. A-21. The district court ruled on November 27, 1996, and by supplemental opinion dated December 16, 1996, that the administrative proceedings should be reversed and that a placement in regular education should be developed in anticipation of Mark's return to the Loudoun County Public Schools[5]. A-6.

On July 8, 1997, the Fourth Circuit ruled in favor of Loudoun finding that the district court's decision was contrary to law. The decision held that, contrary to the dictates of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), the district court impermissibly substituted

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[4]No appeal of the decision to dismiss defendants Hatrick and Waterhouse was made.

[5]As represented to the Fourth Circuit, Mark's parents did not seek his return to Loudoun prior to the Fall of 1997. As of this date, Mark still has not sought readmission to Loudoun.

its notion of educational policies for those of the school authorities (A-8), that the court impermissibly ordered an ideal education by "re-writ[ing] state teaching certification requirements in the guise of applying the IDEA" (A-14), and did not give due deference to the administrative proceedings (A-17). The Court of Appeals declined, however, to find that the case did not present a live controversy due to Mark's move to Montgomery County, Virginia and receipt of a free appropriate public education there. A-6.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

One of the primary responsibilities for school districts under the IDEA is the development of an individualized education plan which provides a free appropriate public education to a disabled student. The ruling by the court of appeals in this case, however, greatly expands the responsibility and accountability for IEP development. The decision requires school districts to continue in litigation over whether an IEP is appropriate even after the disabled student has moved from the jurisdiction of the school district several years earlier, enrolled in another public school system, and received a free appropriate public education in the new school district. This decision was rendered even though the IEP in dispute had long since expired and even though there was no claim for reimbursement. The decision is also contrary to the provisions of the IDEA which limit responsibility of the school district to providing services to students who reside within the jurisdiction of the school district. The Fourth Circuit's ruling that, under these circumstances, there is

still a live controversy, greatly expands the responsibility of school districts under the IDEA and continues needless litigation. This decision about the viability of a controversy over a proposed IEP once the student has moved from the jurisdiction presents an important question of federal law which needs to be settled by this Court.

ARGUMENT

A. Mark Is Not Entitled to a Free Appropriate Public Education In Loudoun Because He Is Not a Resident of Loudoun County.

Mark last attended the Loudoun County Public Schools on December 21, 1994. CA-6. Mrs. Hartmann moved to Montgomery County, Virginia in January 1995, established residency and enrolled Mark in the Montgomery County Public Schools in March 1995. CA-7. The Montgomery County Public Schools considers Mark to be a resident there and entitled to services under the IDEA. Id.

Mark has been attending the Montgomery County Public Schools since March 1995. Id. The Hartmanns have not sought to re-enroll Mark in the Loudoun County Public Schools since December 1994. Id. No IEP has been proposed for Mark by Loudoun since May 1994 because no educational services have been sought by the Hartmanns. The program Mark receives in Montgomery County is free and, according to his parents, offered him an appropriate public education. Id. Montgomery County receives state and federal funds to educate Mark. Id.

Mark's entitlement to educational services from the Loudoun County Public Schools ended with his change of residence because the obligation to provide a free appropriate public education under IDEA is dependent upon his residence within the Loudoun County Public Schools.

The IDEA requires local school divisions to provide a free appropriate public education only to students with disabilities who reside within their jurisdiction. This intent is expressed within the federal statute itself which requires the local school division to give assurance that it will provide programs for disabled students "residing within the jurisdiction of the local educational agency." 20 U.S.C. § 1414(a); see also 34 C.F.R. § 300.220.

Similarly, Virginia's State Regulations Governing Special Education Programs for Children With Disabilities also provide that a local school division's obligation to offer a free appropriate public education to a student with disabilities is limited to students residing within the jurisdiction of the school division. See 8 VAC 20-80-50(A) ("Each Annual Special Education Plan/Report and Funding Application shall include procedures which ensure that all children residing within the jurisdiction of an LEA, birth to age 21, inclusive, who may have disabilities, and who may need special education and related services are identified, located and evaluated.") (emphasis added).

The State Regulations later provide that "[e]ach local school division shall establish and maintain screening procedures to assure the identification of children with

disabilities residing within its jurisdiction and requiring special education." 8 VAC 20-80-50(C)(1) (emphasis added). The regulations further limit the provision of a free appropriate public education "to all children with disabilities, ages 2 to 21, inclusive, residing within the jurisdiction of each LEA. 8 VAC 20-80-60(A)(1) (emphasis added). These many limitations based on residency contained in the state and federal regulations and federal statute make it clear that a school district's responsibility under IDEA to educate students with disabilities is limited to those students who reside within its jurisdiction. Mark does not reside within Loudoun for school purposes and has not for about three years.

Mark is only entitled to a free appropriate public education from the jurisdiction within which he resides. Mark was not entitled to further services from Loudoun following his move to Montgomery County. Mark was no longer entitled to a free appropriate public education from Loudoun. The Fourth Circuit erred in not reversing on this basis.

B. No Educational Services Have Been Sought from Loudoun Since December 1994 and Any Review of the 1994 IEP Would Be Advisory.

It was stipulated that Mark's last day of enrollment in Loudoun was December 1994 and that Mark's parents believed he received a free appropriate public education in Montgomery County, Virginia, in the public schools since that time. It was uncontroverted that Mark had not sought educational services from Loudoun since December 1994.

Under these circumstances any decision that is rendered about the appropriateness of the May 31, 1994, IEP would be advisory in nature.

The Fourth Circuit previously addressed the issue of reviewing subsequent years' IEPs without requiring reexhaustion. See DeVries v. Spillane, 853 F.2d 264, 268 (4th Cir. 1988). Unlike the DeVries case, however, this case does not present a situation where, during the passage of time and the intervening years while the case was pending, new IEPs were sought from or proposed by the school district. New IEPs have not been proposed for Mark because his parents were not seeking services from Loudoun any longer.

The Eight Circuit has made a similar ruling. In Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982), the Eighth Circuit Court of Appeals determined that the EHA (now IDEA) issues presented by Monahan on behalf of his 18 year old daughter who had married and moved out of the district were moot even in light of her future plans to return to the district. Monahan at 1168. The court explained that "[w]hether it will ever happen is speculative, and therefore the issues . . . are not yet ripe for adjudication." Id.

Nor is this a situation where the case is capable of repetition yet evading review. See Honig v. Doe, 484 U.S. 305, 318 (1988). If a student is no longer entitled to services, the case is moot. Id. In Honig, defendant John Doe's claims were ruled moot because at age 24 he was no longer entitled to educational services under the EHA, now IDEA. Honig at 318. Mark's case is moot because he was no longer eligible for services from Loudoun due to his change

in residence. If there is a subsequent re-enrollment, a new IEP will be proposed at that time.

Mark is receiving a free public education which the Hartmanns have approved in another school district in Virginia. Therefore, there is no continuing disagreement between the Hartmanns and the School Board. If Mark were to return to Loudoun, a new IEP would have to be proposed for him at that time. The earlier IEP from May 1994 is no longer appropriate for review. Where an appeal has become moot due to the passage of time without fault on the part of Loudoun, the court should dismiss the case. See, Dennin v. CIAC, 94 F. 3d 96, 101 (2nd Cir. 1996) citing, inter alia, Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979).

CONCLUSION

For the reasons stated above, the Loudoun County Board of Education respectfully requests that, if the Petition for Writ of Certiorari is granted, that this Conditional Cross-Petition also be granted.

Respectfully submitted,

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Counsel for the Loudoun County
Board of Education

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARK HARTMANN, a minor and next friends, Roxana and Joseph Hartmann, et al.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 95-1686-A
LOUDOUN COUNTY BOARD OF EDUCATION, et al.,	)	
Defendant.	)	

ORDER

For the reasons stated in open court, Defendants' Motion to Dismiss is DENIED in part and GRANTED in part, and it is hereby

ORDERED that the Complaint be and is dismissed as to Defendants Edgar B. Hatrick, Jr. and Ned Waterhouse. The Motion is DENIED as to Defendant Loudoun County Board of Education.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 1st day of March, 1996.

/s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MARK HARTMANN, a minor by
his parents and next friends,
Roxanna and Joseph Hartmann,

and

ROXANNA AND JOSEPH HARTMANN,

Plaintiffs,

v. Civil Action
No. 95-1686-A

LOUDOUN COUNTY BOARD OF EDUCATION,

DR. EDGAR B. HATRICK, Superintendent,

and

NED WATERHOUSE, Director of Pupil Services,

Defendants.

MOTION TO DISMISS

COME NOW the defendants, the Loudoun County Board of Education ("Loudoun"), Dr. Edgar B. Hatrick,

Superintendent ("Hatrick") and Ned Waterhouse, Director of Pupil Services ("Waterhouse"), by counsel, pursuant to Federal Rule of Civil Procedure 12(B)(6) and for the reasons more fully set forth in the accompanying Memorandum, respectfully move the Court for dismissal of the Complaint filed by the plaintiffs for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. The Defendants further allege that this case is moot. The defendants ask to be awarded their attorneys fees and costs.

Respectfully submitted,

LOUDOUN COUNTY BOARD OF EDUCATION, DR. EDGAR B. HATRICK and NED WATERHOUSE

By: /s/ Kathleen S. Mehfoud
Counsel

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Counsel for Loudoun County Board of Education,
Dr. Edgar B. Hatrick and Ned Waterhouse

CERTIFICATE

I hereby certify that a true copy of this Motion to Dismiss was sent first-class mail, postage prepaid this 2nd day of February, 1996, to:

Gerard S. Rugel, Esquire
297 Herndon Parkway
Suite 104
Herndon, Virginia 22075

/s/ Kathleen S. Mehfoud
Kathleen S. Mehfoud

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MARK HARTMANN, a minor by
his parents and next friends,
Roxana and Joseph Hartmann,

and

ROXANA AND JOSEPH HARTMANN,

Plaintiffs,

v. Civil Action
No. 95-1686-A

LOUDOUN COUNTY BOARD OF EDUCATION,

Defendant.

ORDER ON FINAL PRETRIAL CONFERENCE

I. STIPULATIONS

1. Mark Hartmann ("Mark") last attended the Loudoun County Public Schools ("Loudoun") on December 21, 1994.

2. Mark was officially dropped from Loudoun's student roles on January 25, 1995.

3. No attempt has been made by Roxanna Hartmann or Joseph Hartmann (the "Hartmanns" or "Parents") to reenroll him in Loudoun since December 1994.

4. Mark has attended the Montgomery County Public Schools ("Montgomery") in Montgomery County, Virginia, since March 1995.

5. Mark receives special education services in Montgomery pursuant to individualized education plans developed for Mark by Montgomery and the Hartmanns.

6. The Hartmanns agree that the services provided to Mark by Montgomery provide Mark with a free appropriate public education.

7. The services provided to Mark in Montgomery have been provided free of charge to the Hartmanns.

8. Mrs. Hartmann has resided in Montgomery County, Virginia, since January 1995 during school months. She resides in Loudoun County during the summer months.

9. Mark has resided with his mother in Montgomery County, Virginia, since January 1995 during school months. He resides in Loudoun County during the summer months.

10. The Hartmanns own a home in Loudoun County, Virginia, in which Mr. Hartmann has continued to reside.

11. Mark and his mother are considered by Montgomery to be residents of Montgomery County for purposes of school attendance.

12. Montgomery receives the funds under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") for providing special education services to Mark.

13. Montgomery receives the funds under state law for providing an education to Mark.

14. Loudoun requested permission for its experts to observe Mark in his educational program in Montgomery. Montgomery denied the permission even though the Hartmanns had given their consent.

15. Montgomery also refused to allow the Hartmanns' expert, Dr. Schwarz, to observe Mark in their program.

16. Montgomery allowed an evaluator selected by the Hartmanns to observe Mark after permission had been denied to Loudoun and to Dr. Schwarz. This observation is not being offered as evidence by the Hartmanns.

Respectfully submitted,

LOUDOUN COUNTY SCHOOL BOARD

By: /s/ Kathleen S. Mehfoud
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